

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte DENNIS K. ELLIOTT, SR.

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Appeal No. 97-2907  
Application 08/314,146<sup>1</sup>

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ON BRIEF

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Before COHEN, CRAWFORD and GONZALES, Administrative Patent Judges.

COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 3, 4, and 7 through 10 and from the refusal of the examiner to allow claims 2, 5, and 6, 12, and 15 through 27, as amended subsequent

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<sup>1</sup> Application for patent filed September 28, 1994.

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to the final rejection.<sup>2</sup> These claims constitute all of the claims remaining in the application.

Appellant's invention pertains to a food dispenser gun and to a method of dispensing an extrudable food product. An understanding of the invention can be derived from a reading of exemplary claims 1 and 26, copies of which appear in EXHIBIT "A1" appended to the RESPONSE TO ORDER REMANDING TO EXAMINER (Paper No. 19).

As evidence of obviousness, the examiner has applied the documents listed below:

Hutton	1,886,022	Nov. 1, 1932
Loucony	2,928,533	Mar. 15, 1960
Chang	4,081,112	Mar. 28, 1978
Summons et al (Summons)	4,899,909	Feb. 13, 1990
 Olsson <sup>3</sup>	 156,022	 Sep. 11, 1956

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<sup>2</sup> An amendment after final rejection (Paper No. 6) was not entered (Paper No. 8), while a later amendment (Paper No. 12) was entered, as apparently acknowledged in paragraph 2 of the answer (Paper 14).

<sup>3</sup> Our understanding of this document is derived from a reading of a translation thereof prepared in the United States Patent and Trademark Office. A copy of the translation is appended to this opinion. It is noted that the examiner has referred to this document by the name "Handels". However, as the translation reveals, the named inventor is Olsson. Simply for consistency with the usage in the record, we shall continue reference to this document by the name Handels.

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(Sweden)

The following rejections are before us for review.<sup>4</sup>

Claims 1, 3 through 10, 12, and 24 stand rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels.

Claim 2 stands rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels, as applied to claim 1 above, further in view of Summons.

Claims 15 through 21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels and Loucony.

Claims 22 and 23 stand rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels, as applied to claims 1 and 9 above, further in view of Hutton.

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<sup>4</sup> A final rejection under 35 U.S.C. § 112, second paragraph, argued in the brief (page 7), was not included in the answer, obviously in light of the entry of the amendment after final rejection (Paper No. 12).

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Claim 25 stands rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels, as applied to claim 9 above, further in view of Loucony.

Claim 26 stands rejected under 35 U.S.C. § 103 as being unpatentable over Chang.

Claim 27 stands rejected under 35 U.S.C. § 103 as being unpatentable over Chang in view of Hutton.

The full text of the examiner's rejections and response to the argument presented by appellant appears in the answer (Paper No. 14 ), while the complete statement of appellant's argument can be found in the main and reply briefs (Paper Nos. 13 and 15).

#### OPINION

In reaching our conclusion on the obviousness issues raised in this appeal, this panel of the board has carefully

considered appellant's specification and claims,<sup>5</sup> the applied teachings,<sup>6</sup> and the respective viewpoints of appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Initially, it is noted that an obviousness question cannot be approached on the basis that an artisan having ordinary skill would have known only what they read in references, because such artisan must be presumed to know something about the art apart from what the references disclose. See In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962). Further, a conclusion of obviousness may be

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<sup>5</sup> Claim 1 sets forth a housing (line 2) and an incremental dispenser (line 7), but fails to recite that the housing is part of the dispenser unit, as disclosed (specification, page 9) and claimed ("said housing of said incremental dispenser" on line 14). We understand claim 1, when read in light of the disclosure. However, the claim language problem raised, supra, should be resolved during any further prosecution before the examiner.

<sup>6</sup> In our evaluation of the applied teachings, we have considered all of the disclosure of each teaching for what it would have fairly taught one of ordinary skill in the art. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). Additionally, this panel of the board has taken into account not only the specific teachings, but also the inferences which one skilled in the art would reasonably have been expected to draw from the disclosure. See In re Preda 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

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made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. See In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969).

With the above in mind, we appreciate from a reading of the "BACKGROUND OF THE INVENTION" section of appellant's specification (page 2) that, when the present invention was made a dispensing gun supporting a cartridge holding food was known. The gun was provided with a lever actuated plunger to move a cartridge piston for displacing a food paste formulation through a discharge spout.

According to appellant (specification, page 3), prior art trigger operated dispensing guns were not feasible in a nursing home environment because of the extremely strict health standards maintained there regarding food preparation and serving. This was because all such trigger operated guns included drive mechanisms exposed to the environment of use, tended to trap food particles during use, and were extremely hard to keep clean. As explained by appellant, there is a

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need in the prior art for a device having all non-smooth portions of the drive mechanism located within a dispenser housing so that the dispenser gun may be kept clean and free of food debris at all times.

We turn now to the rejections, and address the claims as argued by appellant.

Claims 1 through 8 and claim 2

We reverse the rejection of these claims.

Claim 1 is drawn to a food dispenser gun comprising, inter alia, a housing and an incremental dispenser comprising a manual activator, a member operable to move a rod (advancement means) and a retrograde lock, wherein the advancement means and retrograde lock are "completely enclosed" by the housing.

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The Chang patent is drawn to a manually powered caulking gun that includes a pistol-type handle open at the top and bottom (column 1, lines 42 through 45). All mechanism of the gun (including first grip 34) is located inside the handle except the protruding ends of the trigger, release portion, and plunger (column 2, lines 2 through 4). As explained by the patentee (column 2, lines 42 through 44), the operative contact of the trigger with the first grip should be kept lubricated and this is "highly visible and readily accessible for inspection and oiling."

The Handels document (Figs. 1 through 4) teaches a cylinder 1 that is provided, on the end surrounding the clamping washers 19 and 27, with an end gable 2, a hanging floor 3, and an arcuate plate (not numbered) overlying a top end of the cylinder. A lever 12 passes through an opening 14 in cylinder 1.

Appellant points out (main brief, pages 8 through 10) that Chang teaches away by disclosing an operating mechanism



that is "open", while the Handels device includes an opening 14 where trigger 12 enters the housing effecting a partially enclosed housing.<sup>7</sup>

From our perspective, one having ordinary skill in the art would not have been motivated to modify the gun of Chang, as proposed by the examiner, since complete enclosure of the housing would have defeated the express intent of the patentee of an open housing to achieve the stated objective of having the internal mechanism highly visible and readily accessible for inspection and oiling. For this reason, the rejection of claim 1 on the evidence of obviousness before us is not well founded and must be reversed. It follows that the rejection of dependent claims 3 through 8 is likewise reversed.

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<sup>7</sup> Appellant is claiming structure that is "completely enclosed" by a housing. However, notwithstanding appellant's statement in the specification (page 12) that the "only protrusion" are the very small rod release button 28 and the proximal end of the rod 16, akin to the teaching of Handels, we find that appellant's trigger 16 likewise protrudes from the housing. Thus, we understand the recitation of "completely enclosed" in claim 1, consistent with appellant's disclosure, to clearly permit the inclusion of protrusions through the housing. Like appellant (reply brief, page 2), we appreciate that, in accordance with the "completely enclosed" requirement of the claims, the trigger interface with the housing as depicted in Fig. 5 would fill an opening in the housing, akin to the release button, for consistency with the aforementioned requirement of the claims.

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The rejection of claim 2, a claim dependent from claim 1, further includes the teaching of Summons. The teaching of Summons, however, does not overcome the deficiency of the Chang and Handels documents discussed above. Thus, the rejection of claim 2 must also be reversed.

Claims 9, 10, 12, 24, 25, claims 15 through 21  
and claims 22 and 23

We reverse the respective rejections of claims 9, 10, 12, 24, claims 15 through 21, claims 22 and 23, and claim 25.

Appellant argues these rejections on the basis of the failure of the combined teachings of Chang and Handels to be suggestive of modifying the device of Chang as proposed by the examiner. Since we agreed earlier that the Chang and Handels documents would not have been suggestive of their combination according to the examiner's rationale, and further find that the additional teachings of Lucony and Hutton do not overcome the earlier noted deficiency of Chang and Handels, the respective rejections of the specified claims must be

reversed.

Claims 26 and 27

We reverse the rejections of claims 26 and 27, respectively.

As pointed out by appellant (brief, page 11), these claims are drawn to a method of dispensing an extrudable food product comprising, inter alia, the step of providing a reusable tube to hold "said extrudable food product". Simply stated, the patents to Chang and Hutton are not concerned at all with a method of dispensing an extrudable food product. Since the applied evidence of obviousness does not address the specific content of the claimed subject matter, we are constrained to reverse the respective rejections of claims 26 and 27. We do note, however, that a conventional cylindrical container supported by the hemi-

cylinder 20 of Chang (column 1, lines 52 through 54) would fairly be denoted a removable and reusable container.

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REMAND TO THE EXAMINER

In light of the reversal , supra, we remand this application to the examiner to assess the patentability of the claimed food dispenser gun (with "completely enclosed" limitation) and method of dispensing an extrudable food product (with NO "completely enclosed" limitation) based upon the acknowledged prior art trigger operated food dispensing guns including a food cartridge (appellant's specification, pages 2 and 3) and other known relevant prior art. It is recognized that a trigger operated caulking gun may be reasonably pertinent to the problems encountered with trigger operated guns for dispensing an extrudable food product.

In summary, this panel of the board has:

reversed the rejection of claims 1, 3 through 10, 12, and 24 under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels;

reversed the rejection of claim 2 under 35 U.S.C. § 103 as being unpatentable over Chang in view of Handels and

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Summons;

reversed the rejection of claims 15 through 21 under  
35 U.S.C. § 103 as being unpatentable over Chang in view of  
Handels and Loucony;

reversed the rejection of claims 22 and 23 under 35  
U.S.C.  
§ 103 as being unpatentable over Chang in view of Handels and  
Hutton;

reversed the rejection of claim 25 under 35 U.S.C. § 103  
as being unpatentable over Chang in view of Handels and  
Loucony;

reversed the rejection of claim 26 under 35 U.S.C. § 103  
as being unpatentable over Chang; and

reversed the rejection of claim 27 under 35 U.S.C. § 103  
as being unpatentable over Chang in view of Hutton.

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Additionally, we have remanded the application to the  
examiner for the reason delineated, supra.

The decision of the examiner is reversed.

REVERSED AND REMANDED

IRWIN CHARLES COHEN	)	
Administrative Patent Judge	)	)
	)	
	)	
	)	BOARD OF PATENT
MURRIEL E. CRAWFORD	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
JOHN F. GONZALES	)	
Administrative Patent Judge	)	

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